



Administrative Report

P.3., File # 21-2733

Meeting Date: 7/13/2021

To: MAYOR AND CITY COUNCIL

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TITLE

DISCUSSION AND POSSIBLE ACTION REGARDING AMENDMENTS TO REDONDO BEACH MUNICIPAL CODE SECTION 10-3.901 CEQA APPEAL REQUIREMENTS AND PROCEDURES

INTRODUCE BY TITLE ONLY ORDINANCE NO. 3217-21, AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF REDONDO BEACH, CALIFORNIA, AMENDING MUNICIPAL CODE TITLE 10, CHAPTER 3, ARTICLE 9, SECTION 10-3-901 CEQA APPEAL REQUIREMENTS AND PROCEDURES, FOR INTRODUCTION AND FIRST READING

EXECUTIVE SUMMARY

At the May 18, 2021 City Council meeting, Council directed staff to prepare an amendment to the City of Redondo Beach CEQA Appeal regulations in Redondo Beach Municipal Code (RBMC) 10-3.901. As a Blue Folder item for that Council Meeting, Councilmember Nehrenheim provided proposed revisions to the CEQA Appeal regulations (see attached).

BACKGROUND

During the discussion on the agenda item, staff did provide initial concerns, and Council requested that at such time that the ordinance is revisited by City Council, the City Attorney's Office, the City Clerk's Office, and the Community Development Department provide written analyses regarding potential complications the amendments may pose.

Council directed the City Attorney to formally bring back the revisions to the ordinance for introduction and first reading at the July 6, 2021 City Council meeting. At the May 18, 2021 meeting, additional revisions were discussed by City Council including:

- Discussed, but not included officially in the direction to the City Attorney, includes in Section (i) to allow the appellant to submit additional documents up to the time the agenda is posted.
- Included officially in the direction to the City Attorney, include in Section (d) to state "Upon receipt of a CEQA appeal electronically, the City Clerk shall acknowledge receipt via response email to the appellant or appellants."

The City Attorney's office, City Clerk's office, and Community Development Department have reviewed the proposed revisions and do not recommend the amendments to the ordinance other than the elimination of the requirement of notification by certified mail. Staff provides the following areas of concern for the City Council to consider in its' deliberations to amend the relevant code sections:

- A. Many of the proposed changes to ordinance undo sections of the Ordinance that were challenged in court and upheld by the Judge. The below issues were previously litigated and the Ordinance was upheld:
- Exhaustion Procedure Challenge (RPMC 10-3.901(h)): provides that all grounds for CEQA appeal to the City Council must be presented orally or in writing to the non -elected decision -making body. Noncompliance with this exhaustion requirement "shall be grounds for denial" for those portions of the appeal not exhausted before the nonelected body.

Court's holding: CEQA permits a local agency's procedures to impose an exhaustion requirement and limit the issues and grounds raised in a de novo appeal before the elected body to those issues that were presented to the non -elected body. That is what RPMC section 10-3.901(h) does.

- 7 Day Submittal Limit Challenge (RPMC 10-3.901(i)): provides that any additional documents submitted by the appellant, such as presentations, must be filed with the city Clerk no later than seven (7) calendar days prior to the date set for the hearing by the City Council and the Ordinance requires each prospective appellant to file their own separate appeal to the City Council. RPMC §10-3.901(a).

Court's holding: The Ordinance's requirement that all appeal documentation be submitted seven days before the hearing, coupled with its requirements that issues must be stated in the appeal with specificity and have been exhausted before the non-elected body -- somehow violates CEQA's public participation mandate is based on the faulty premise that CEQA requires two bites at the apple: one before a subordinate non -elected body and a second before the elected body. It does not, as demonstrated by the fact that a local agency complies with CEQA if only the elected body receives evidence and makes the initial and only certification decision. Pub. Res. Code §21151(c). In that circumstance, the elected body hears all information timely submitted, considers all issues presented, and reaches a decision on EIR certification and project approval. There is no right to appeal and no right to submit additional evidence. Consequently, where a local agency decides to have a non -elected body perform the initial task of certification with a de novo appeal before the elected body, it follows that the local agency may impose procedures for the appeal that would be inappropriate for an initial decision.

The City adopted the CEQA appeal procedures at issue in response to the appellate court's discussion in *Citizens for Open Government v. City of Lodi*, ("Lodi") (2006) 144 Cal.App.4th 865. City Opp. at 20-21. In Lodi, two citizen groups appeared before a planning commission considering a draft EIR and each raised a number of different issues. Id. at 869. Only one group filed an appeal to the city council. Id. at 870-71. The court addressed whether petitioners, who appeared before the planning commission but did not file their own CEQA appeal, failed to exhaust their administrative remedies by not filing an appeal. Id. at 873. The court allowed the petitioners to maintain their lawsuit, noting that the city's municipal code procedures "did not require the

specification of issues for the appeal... [and] does not limit the City Council's consideration or review...to the issues raised by the person filing the appeal. Id. at 877 (emphasis added). The municipal code also "does not require each and every person adversely affected by a decision of the Planning Commission on an application for a use permit to file an appeal to preserve their right to participate and object before the City Council and ultimately pursue a remedy in the courts." Id. at 878 (emphasis added). The City's Ordinance addresses these matters by specifying that each appellant appeal separately, specify what they are appealing, and exhaust their administrative remedies. Although Petitioners correctly reply that nothing in Lodi identifies or discusses any gamesmanship, the City's point is valid. The big picture does not favor Petitioners because the limits imposed by the City's CEQA Ordinance are constitutionally reasonable and generally not arbitrary. While Lodi did not expressly approve the language which the City used to draft its Ordinance, the City reasonably relied on it to require each appellant to separately appeal, and limit the issues in their appeal to the issues specifically stated. All of this was done to prevent gamesmanship by citizens or groups who (a) do not present issues to the non-elected body, and save them for the City Council or (b) try to collectively appeal to raise issues not raised by all of them to the non-elected body. The appeal procedure provide the City Council an opportunity to hear from each appellant and consider their specific concerns.

It is true that the Ordinance provides that (1) an untimely appeal "shall not be heard by City Council" (RPMC §10-3.901(b)), (b) the failure to comply with exhaustion requirement shall be grounds for denial of the non-exhausted portions of the appeal (RPMC §10-3.901(h)), and (c) additional documentation submitted on an untimely basis "shall not be considered". RPMC §3.901 (i). But an ordinance's mandatory language may in fact be only directory. The "mandatory" or "directory" designation denotes "whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates." City of Santa Monica .v. Gonzalez, (2008) 43 Ca1.4th 905, 923. Courts make this designation by ascertaining the legislative intent. Id. at 924. Courts should "look to the procedure's purpose or function. If the procedure is essential to promote the statutory design, it is 'mandatory' and noncompliance has an invalidating effect. If not, it is directory." Id. An appellant's failure to file a timely appeal will result in mandatory foreclosure under RPMC section 10-3.901(b). Time deadlines often are jurisdictional in the sense that they are bright line rules without discretion for the agency to avoid them. However, use of the word "shall" with respect to the failure to comply with exhaustion requirements and the consideration of untimely additional documents on appeal in RPMC sections 10-3.901(h) and (i), respectively, is merely directory; the City Council plainly has discretion to consider non-compliant issues and evidence. This fact is shown by the City Council's consideration on appeal of Petitioners' late filed documents, as well as issues Petitioners either failed to exhaust before the Harbor Commission or failed to specify on appeal. Therefore, Petitioners unfairly conclude that the threatened remedy of refusal to consider documents or issues will be applied in all cases, something it must show for a facial challenge.

- Requirement that Citizen Appellants provide notice to the applicant under 10-3.901(d): The appellant must provide certified mail notification of their appeal to the project applicant by the last day to file the appeal. The ordinance does not impose a reciprocal requirement that project applicants notify citizen stakeholders of the project applicant's appeal. The penalty for failing to timely mail the notification "shall be grounds for dismissal of the appeal."

Court's holding: A requirement that the appellant notify the project applicant of the appeal is

reasonable. RBMC §10-3.901(d). The procedure ensures that a project applicant receives proper notice, thus ensuring their due process rights. While a local agency such as the City may customarily provide this notice, there is no public policy reason why it should do so. By analogy, the Coastal Act regulations require the appellant to give notice for Coastal Commission appeals. 14 CCR §13111(d) ("section 13111(d)")("Notification shall be by delivering a copy of the completed Notice of Appeal to the... mailing address(es) of [the project applicant and any interested parties]....

Unwarranted failure to perform such notification may be grounds for dismissal of the appeal by the Commission."). The CEQA Ordinance does discriminate between appeals by project applicants and appeals by citizen stakeholders, but there is a rational basis to do so. A project applicant is entitled to due process; a project applicant must receive notice of a citizen's appeal from a project approval. Interested citizens are not entitled to due process, and reciprocity is not required. If a project applicant were required to give notice to citizen stakeholders of the applicant's appeal, the process would be unworkable. The project applicant does not necessarily know who those stakeholders are and there would be no guarantee that all pertinent stakeholders would receive notice. The project applicant could give notice to every person who signed in at the non -elected body's hearing, but no doubt others who failed to sign in would still want notice. The City's noticing procedures provide citizen stakeholders sufficient notice, of the date and time of any such appeal hearings. See property owners within 300 feet, and posting at project site). Petitioners have not provided any authority that interested citizens are entitled to more. Is certified mail necessary for service on the project applicant? The answer is no.

A copy of the relevant portions of the Court's judgment upholding the Ordinance (except for the requirement of providing notice by certified mail is attached.)

B. Some of the proposed changes to the Ordinance that implicate substantive or procedural due process:

- Under (b), the modifications are likely to implicate an applicant's due process rights. An appellant only needs to file a letter of "intent to appeal." It does not actually specify the timeframe for filing the appeal. Issues must be fairly presented to the agency...evidence must be presented in a manner that gives the agency the opportunity to respond with countervailing evidence.
- Under (d), the modifications are likely to implicate an applicant's due process rights by eliminating all noticing requirements. Issues must be fairly presented to the agency... evidence must be presented in a manner that gives the agency the opportunity to respond with countervailing evidence.
- Under (i), the modifications are likely to implicate an applicant's due process rights by eliminating the time to consider and respond to submitted materials and to prevent data dumping. Issues must be fairly presented to the agency...evidence must be presented in a manner that gives the agency the opportunity to respond with countervailing evidence.

C. Practical challenges in implementing the amended Ordinance::

- Under (b), the appeal process would include the appeal of a notice of exemption. By extending it out to 20 business days, a very basic project that is otherwise exempt cannot

move forward for over a month's time until the appeal period is complete.

- Under (b), the phrase "has been notified" isn't clear if it is the date sent or once received.
- Under (c), the submittal of the fee five calendar days prior to the appeal hearing does not ensure that the administrative costs already encumbered for notice of hearing and other processing is covered, since the notice would have already been sent for publication
- Under (i), the appellant is allowed to submit additional documents up to the start of the appeal hearing. However, staff would not have had a chance to review or prepare responses to those materials. Especially since the appellant would be allowed to add more supporting documents or grounds and not just presentation materials. As well, the revised language about City staff presentations and supporting documents to be considered are to be published at the time the agenda is posted (multiple days prior to the hearing). This does not allow the City staff to provide any responses to material the appellant may submit between agenda publication and the start of the hearing, and requires the staff to have their presentation finalized. This does not afford an opportunity to provide the City Council with perhaps fully researched information, since staff may not have the time to research last minute supporting documents submitted by the appellant, or even allow staff to officially respond. The concern would be that Council could possibly be deciding on the appeal without full information.

ATTACHMENTS

- Councilmember Nehrenheim's updates for the 10-3.901 CEQA appeal requirements and procedures
- Ordinance - CEQA Appeal 10-3.901
- Portions of the Court's decision in case #BS 166124 dealing with the challenge to the City's current CEQA appeal regulations
- Current CEQA appeal regulations (Adopted in January 2015)